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From Lonrho to BHS: The Changing Character of Corporate Governance in Contemporary Capitalism

Paddy Ireland

INTRODUCTION: FROM FACET TO NORM

Edward Heath was not noted for his memorable turns of phrase. Indeed, one of the few phrases for which he is remembered – ‘the unpleasant and unacceptable face of capitalism’¹ – appears to have been unintended, the mistaken product of a mixture of vanity and myopia. In 1973, in a Commons debate on the talks taking place between the TUC and the CBI about inflation, Heath was asked to condemn the practices of Lonrho.² Although he was short-sighted, Heath was loathe to wear glasses and he couldn’t quite make out the words on the script provided by Number 10: ‘This is an unpleasant and unacceptable facet of capitalism’.³ By omitting the ‘t’, he unwittingly coined a phrase which continues to be wheeled out when particularly egregious corporate scandals come to light. It got one of its most recent airings in 2016 in the report of the House of Commons Joint Work and Pensions and Business, Innovations and Skills Committee into BHS. The way in which ‘Sir Philip Greene, Dominic Chappell and their respective directors, advisers and hangers-on’ had got ‘rich or richer’ at the expense of ‘ordinary employees and pensioners’, the report concluded, was ‘the unacceptable face of capitalism’.⁴ It was used again in August 2017 by the Prime Minister, Theresa May, to describe the practices of companies who had ‘deliberately broken rules designed to protect their workers’ and ‘award[ed] pay rises to bosses that far outstrip[ped] the company’s performance’.⁵

It’s worth briefly reminding ourselves of the events that prompted Heath’s original condemnation. Lonrho had begun life in 1909 as a mining company, before gradually branching out into ranching, agriculture and asbestos. The company only really began to take off, however, when Roland W (‘Tiny’) Rowland joined the board in 1961. Ruthlessly and skilfully exploiting the opportunities thrown up by de-colonisation, Rowland quickly turned the company into an international conglomerate based in Africa. Schmoozing, bribery and corruption were central parts of his *modus operandi*. For the most part, the British government were happy to turn a blind eye as they sought to find new and covert forms of control to replace the direct forms of the colonial era.⁶

¹ HC Deb 15 May 1973 vol 856 c1243

² Originally the London and Rhodesia Mining and Land Company Ltd.

³ See J Campbell, *Edward Heath: A Biography* (Jonathan Cape, 1993) 528; M McManus, *Edward Heath: A Singular Life* (Elliott & Thompson, 2016) 132.

⁴ House of Commons, Work & Pensions and Business, Innovation & Skills Committees, BHS: First Report (July 2016), p55, para 168.

⁵ *The Mail on Sunday* (27 August 2017): <http://www.dailymail.co.uk/news/article-4826658/PM-Time-tackle-unacceptable-face-capitalism.html>.

⁶ They continued to turn a blind eye even when it became apparent that Lonrho was engaged in busting the sanctions which were imposed on Rhodesia following UDI in 1965. See C Uche, ‘Lonrho in Africa:

In the early 1970s, however, with Lonrho in need of finance, a new Chairman was appointed (Duncan Sandys, a former Conservative cabinet minister), together with a number of new board members, including Sir Basil Smallpeice, 'the personification of City orthodoxy'.⁷ Smallpeice and others quickly became concerned about financial irregularities, including illicit payments to Sandys, and Rowland's style of management, which involved circumventing, ignoring and deceiving the board. A boardroom dispute broke out in which eight of the directors, led by Smallpeice (dubbed by City and media supporters as 'the straight eight'), sought to remove Rowland. He resisted, applied for an injunction, and in the ensuing court case the company's dirty linen was aired in public. It became clear that apparently respectable directors were avoiding taxes, being paid large sums of money for little (if any) work, and living rent-free in expensive houses. For the Heath government it couldn't have come at a worse time, for, confronted with growing labour unrest, it was trying to clamp down on trade unions and strikes.⁸ To make matters worse, Rowland lost the case (Heath's condemnation came the day after the decision), but won the war: the court decided the composition of the board should be left to the shareholders and a few days later at a rowdy extraordinary general meeting, Rowland, using his 20% shareholding in the company and with the support of the great majority of the other shareholders, was able not only to retain his position on the board but to vote off the eight opposition directors. The shareholders, it seems, didn't care about his methods as long as the dividends kept rolling in.

Post-BHS, it is tempting to conclude that nothing much has changed and that a certain amount of morally reprehensible behaviour is part and parcel – a 'facet' – of capitalism, the price we have to pay for the benefits it brings. That certainly seems to have been Heath's view. Lonrho, he argued, was an exception, not the rule: 'one should not suggest that the whole of British industry consists of practices of this kind'.⁹ In similar vein, Theresa May sought to stress that the practices she was condemning involved only 'a small minority of executives'.¹⁰ While there might have been some justification for claims of this sort in 1973, however, things have since changed and changed quite fundamentally. It is not simply that the volume of obviously scandalous behaviour has increased - though it has - but that the capitalism that has emerged in recent decades is in its normal operations morally reprehensible and productively dysfunctional, as are the forms of corporate governance that are an integral part of it. In short, the 'unacceptable' is part and parcel of contemporary capitalism. It is institutionally and culturally embedded. As a recent blogger, comparing Lonrho to the VW emissions scandal, observed: 'What high standards we must have had back then, four decades

The Unacceptable face of Capitalism or the Ugly Face of Neo-Colonialism?' (2015) 16 *Enterprise & Society* 354.

⁷ S Cronje, M Ling & G Cronje, *Lonrho: Portrait of a Multinational* (Pelican 1976) 104

⁸ See Cronje et al, note 7, chap 7, 134-145. Most famously through the Industrial Relations Act 1971 (c.72).

⁹ See Hansard debate, note 1.

¹⁰ City AM, 27 August 2017: <http://www.cityam.com/270909/theresa-may-launches-new-rules-executive-pay-and-workers>

ago, if a relatively minor dispute over governance could make such headlines'.¹¹ The Lohrho scandal didn't, after all, involve a company collapse, massive job losses or the destruction of thousands of employee pensions.¹²

This paper explores the ways in which corporate governance and capitalism have changed in the forty or so years separating Lohrho and BHS and examines how what could be described with some plausibility as a 'facet' of capitalism in 1973 has become closer to the norm in 2017. It begins by sketching out the logic of capitalism and the ethics that must be expected to accompany it, before moving on to explore the different ways this logic has played out in empirical reality since the end of the Second World War, particularly in the corporate context. The paper argues that the post-war heyday of social democracy saw the logic of capitalism tempered and restrained, but that recent decades have seen the more 'acceptable' form of capitalism that resulted from this replaced by a much-less-acceptable, highly financialized, neoliberal form of capitalism in which the logic of capitalism operates in an increasingly pure and unadulterated manner.¹³ In this context, the paper argues that it is not, as some have suggested, today's neoliberal capitalism that is abnormal and exceptional, but, rather, the socially democratic capitalism of the post-war period. As time has passed, it has become clear that the latter was the product of a very specific conjuncture. What we are now experiencing is corporate capitalism operating according to its normal, financialized, and inherently unethical logic. From this perspective, 'regulation' in the traditional sense – in which certain arrangements and processes are left untouched and treated as though they are unalterable givens with a pre-regulatory existence¹⁴ – is unlikely to deal with the problems we are facing. An 'acceptable' capitalism, the paper concludes, would be much less of a capitalism, or, indeed, something substantially other than capitalism.

THE LOGIC OF CAPITALISM

One only has to reflect on capitalism's self-description – its own account of how it operates and the nature of the people operating within it – to see that a tendency towards unethical behaviour is embedded in its institutional logic. Capitalism purports to be a system based on competitive free markets in which consensual contractual exchanges take place between private agents seeking personal material gain. These

¹¹ <https://www.marketingsociety.com/the-library/unacceptable-face-capitalism#W657HxHfkTEacZik.97>

¹² The buck did not stop at Green's door. For example, Goldman Sachs were heavily involved in the sale of BHS to the consortium led by the former bankrupt, Dominic Chappell: <https://www.ft.com/content/0ff4c558-51ae-11e6-befd-2fc0c26b3c60#axzz4FLhjs3Vd>. Since this article was written, the multinational construction company Carillion has collapsed in a manner bearing many similar features to BHS.

¹³ Following Gerald Epstein, I use the terms 'financialized' and 'financialization' broadly to refer to 'the increasing role of financial motives, financial markets, financial actors and financial institutions in the operations of the domestic and international economies': G Epstein, 'Introduction', in G Epstein (ed), *Financialization and the World Economy* (Edward Elgar 2005) 3.

¹⁴ For a discussion of this, see P Ireland, 'Property, Private Government and the Myth of Deregulation', in S Worthington (ed), *Commercial law and Commercial Practice* (Hart 2003) 85.

market exchanges are secured and guaranteed by a neutral state which protects private property rights and freedom of contract. There is no ceiling on the size of the material gains that these market actors might secure as long as they play by the rules; nor should there be.¹⁵ The search for unlimited wealth is '*rational, ... natural and normal*, and therefore *to be expected*' because it is consonant with human nature.¹⁶ Unlike many of its rivals, capitalism is free from moral self-deception: it accords with and reflects human nature, and recognises the egoism of *homo economus* and her insatiable appetite to consume.¹⁷ Market competition and this absence of limits also underpin capitalism's dynamism and ability to deliver material wealth. Moreover, as any large accumulations of wealth arising out of market processes are the products of voluntary and consensual exchanges, they are *prima facie* legitimate. They are further legitimised by the fact the self-interested pursuit of unlimited material gain in competitive markets operates in the wider public interest by ensuring the efficient allocation of resources and the maximisation of aggregate social wealth: private vice yields public benefits.¹⁸ In recent decades, in the corporate context, these ideas have found expression in the idea that 'maximising shareholder value' benefits not only shareholders but society as a whole. From this perspective, the globalisation and liberalisation of product and financial markets and the heightened competition this has brought is to be welcomed, for the operation of these markets has compelled managers to profit maximise and to produce as efficiently as possible. If they don't they simply won't survive. Market imperatives are positive forces, underpinning capitalism's efficiency, productiveness, inventiveness and relentless (endogenous) dynamism.¹⁹

Contained within this account of human nature and the economic functioning of a 'pure' capitalism is an account of how economic actors must be expected to behave. As E P Thompson observed, capitalism contains 'an economic logic *and* a moral logic', which are 'different expressions of the same kernel of human relationship' and which find 'simultaneous expression ... in all systems and areas of social life', in norms and culture, and 'in characteristic values and modes of thought as well as in characteristic

¹⁵ Oxfam recently reported that the world's richest 8 individuals owned as much wealth as the poorest 50% of the world's population: <https://www.oxfam.org/en/pressroom/pressreleases/2017-01-16/just-8-men-own-same-wealth-half-world>. Others have made similar claims, though the number varies. Even if the 8 were increased a hundred or a thousand fold, the point would stand.

¹⁶ W Streeck, 'Taking Capitalism seriously: Towards an Institutional Approach to Contemporary Political Economy', (2011) 9 Socio-Economic Review 137 at 149 (his emphases). This section is indebted to Streeck's excellent analysis.

¹⁷ This naturalises and legitimates capital's need for endless expansion, and for ever rising consumption and for the construction of new desires. It also underpins the tendency within neo-classical economics to view even seemingly selfless acts as motivated by self-interest. From this perspective, altruism generates misallocations of resources.

¹⁸ This perhaps explains why Peter Mandelson was so 'intensely relaxed' about people getting 'filthy rich'. 'The normalized actor under capitalism is someone who does not relent in his [or her] effort to get richer regardless of what he has already achieved; for him 'the sky is the limit', and there is no pre-established point where he has 'had enough' or is institutionally expected to have enough': Streeck, note 16, 149.

¹⁹ On the centrality of these market imperatives to the logic of capitalism, see EM Wood, *The Origin of Capitalism* (Verso 2002) chapter 1.

patters of accumulation and exchange'.²⁰ For Thompson, these logics are derived from, and rooted in, capitalism's institutional arrangements, and in particular its social property relations. By contrast, for the defenders of capitalism they are derived from, and rooted in, human nature. Human beings are rational egoists who must be expected to strive to improve their position at the expense of others. The emergence of market institutions and imperatives both reflect and reinforce these natural tendencies. It follows that although they are supposed to abide by the rules of the game, rule makers and regulators should expect people to deal with those rules – labour standards, environmental regulations, tax laws and the like – and any ethical norms associated with them in an instrumental manner, 'from the perspective of how they may be applied, avoided or circumvented for individual benefit'. As a result, Streeck says, 'rule makers cannot expect rule takers to interpret their rules in ways other than in *studied bad faith*'.²¹ Indeed, not only is it perfectly 'natural' for people to seek to bend or avoid rules and to circumvent social obligations if this generates market and/or material advantage, competition may compel them to do so. As Oliver Williamson explains, what we must expect, given the way capitalist competition operates, is institutionalised opportunism, deviousness and bad faith, what he refers to as 'self-interest seeking guile'.²² Guile entails 'calculated efforts to mislead, distort, disguise, obfuscate, or otherwise confuse'.²³ The inclination to avoid rules and social obligations is not, of course, confined to capitalism. The difference, as Streeck notes, is that under capitalism, 'the inventive pursuit of self-interest is in the spirit of the social order itself'; it is 'both institutionally expected and empirically prevailing'.²⁴ Indeed, outdoing and eliminating your rivals, is not only legitimate but admirable. Thus, entrepreneurially and inventively twisting (or avoiding) rules to one's advantage is often seen – sometimes openly and publicly, sometimes more covertly – as something

²⁰ EP Thompson, 'The Long Revolution – II' (1961) 10 *New Left Review* 34 at 38. EP Thompson, *The Poverty of Theory* (Merlin 1978) 84, 121, 254. See also Thompson, 'Folklore, Anthropology, and Social History' (1978) 3 *Indian Historical Review* 247 at 261-264. Thompson urged a return to a 'full sense of a mode of production', rejecting the idea that the 'economic' was somehow more 'primary' or 'real' than, say, the legal or cultural: see P Ireland, 'History, Critical Legal Studies and the Mysterious Disappearance of Capitalism' (2002) 62 *Modern Law Review* 120. Thompson's idea of a 'full sense of a mode of production' can help us to grasp the different aspects and uses of the term, 'neoliberalism', which have led some to reject it as a useful category of analysis. Neoliberalism has been variously deployed used to describe a market fundamentalist intellectual project, a set of economic policies, and a range of cultural changes linked to growing commodification. From a Thompsonian perspective, they are all best viewed as different aspects of *neoliberal capitalism* as a mode of production in the 'full sense'.

²¹ Streeck, note 16, 143-44.

²² O Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (New York, Free Press, 1975) 255.

²³ O Williamson, *The Economic Institutions of Capitalism* (New York, Free Press, 1985) 47. For a critique, see GM Hodgson, 'Opportunism is not the only reason why firms exist: why an explanatory emphasis on opportunism may mislead management strategy' (2004) 13 *Industrial and Corporate Change* 401-418.

²⁴ Streeck, note 16, 144: 'Capitalist institutions cannot but stylize capitalist actors as rational-utilitarian exploiters of gaps in rules. This is because of a dominant ethos that cannot condemn egoistically rational innovation in rule following, if not in rule breaking, and a culture that lacks the normative means by which to enforce and reward behaviour in good faith'.

to be admired ('smart'²⁵), rather than as something to be condemned. It is part of the system's ethos and dynamic. The operation of capitalism thus tends towards the prevalence of what the conservative German economist Götz Briefs called 'marginal ethics' (*grenzmoral*). These are 'the ethics of those least restrained in the competitive struggle by moral inhibitions, that is of those who because of their minimal ethics have under otherwise equal conditions the best chances of success and who on this account force competing groups, at the penalty of elimination from competition, gradually to adapt in their trading to the respectively lowest level of social ethics (i.e. to the 'marginal ethics')'.²⁶ Sometimes, particularly when the market pressures are intense, these marginal ethics become so culturally entrenched that people operate far more unethically than competitive survival and success requires.²⁷

It may, of course, be that, ultimately, this sort of behaviour risks undermining the very system of which it is part: to function a capitalist economy needs some degree of mutual trust, reciprocity, solidarity, and goodwill. However, 'one [cannot] rely on capitalist utility maximisers [to] exercise[e] self-restraint in the name of the collective interest'.²⁸ On the contrary, in a competitive environment, adhering to ethical norms and taking account of the collective interest when those around you are ignoring them is likely to prove a recipe for failure. It is not merely that the benefits of bending and circumventing rules and avoiding social obligations are often considerable, but that the costs of failing to do so are even greater. Having moral scruples – or in the corporate context, seeking to act in a socially responsible manner and failing relentlessly to profit maximise - might prove not merely disadvantageous but potentially self-destructive.

LES TRENTE GLORIEUSES: THE LONG POST-WAR BOOM

How has the logic of capitalism played out over time? The Lonrho incident occurred at what, with hindsight, we can see as a pivotal moment in the history of modern capitalism: the end of the long post-war boom. Contrary to common belief, the depression of the 1930s was brought to an end not by government interventions like the New Deal but by the Second World War. Indeed, shortly before war broke out, amidst renewed recession, the Keynesian Harvard economist, Alvin Hansen, sparked a debate about the causes of the depression by eschewing explanations that focused on short-term fluctuations in the business cycle and arguing that deeper structural forces were at work. Capitalism, he suggested, tended towards 'secular stagnation'

²⁵ In one of the 2016 Presidential debates, Donald Trump responded to Hillary Clinton's claim that he hadn't paid Federal income taxes for a number of years with, 'That makes me smart': <http://edition.cnn.com/2016/09/26/politics/donald-trump-federal-income-taxes-smart-debate/index.html>.

²⁶ Quoted in Sreeck, note 16, 145. Briefs was a conservative, Catholic, German social theorist and institutional economist. The erosion of ethical standards is one of the themes of the documentary filmmaker Alex Gibney's series, *Dirty Money*.

²⁷ The Panama and Paradise papers provide examples of this. Some of these people are so rich their tax avoidance schemes seem inexplicable.

²⁸ Sreeck, note 16, 147.

and was characterised by 'sick recoveries which die in their infancy and depressions which feed on themselves and leave a hard and seemingly immovable core of unemployment'.²⁹ This idea was quickly forgotten, however, when war spending and the destruction of capital provided a basis for restored profitability. The three post-war decades saw a sustained period of growth: the 'long boom', the 'Golden Age' of Social Democracy, *les trente glorieuses*. During this period, various forces acted to temper the logic of capitalism. With trade union membership steadily rising (it peaked in the UK in the late 70s), collective bargaining spreading and unemployment low, labour was able to act as a powerful 'countervailing power' to capital.³⁰ Finance, already weakened by the depression and subject in places such as the US to more risk-averse regulatory structures, was kept in check by the fixed exchange rates and strictly regulated capital flows of the Bretton Woods system. And the state continued, as it had during the war, to play a major role not only in co-ordinating and regulating the economy, but in distributing the social product. Although this alarmed liberal free-marketeers, many now saw significant government interventions in the economy as not only socially desirable but necessary to save capitalism from itself by making it palatable to the economically and politically empowered working classes. These multifarious forces, together with sustained growth, facilitated the forging of a class compromise in which workers (and their political representatives) broadly accepted capitalist markets and property forms in return for steadily rising wages and living standards, redistributive tax policies, low levels of unemployment, and improving levels of social security, education, and health. This period saw falls in income and wealth inequality and was thought by many to be ushering in a new more welfare-oriented, more humane and more co-ordinated 'managerial' or 'managed' capitalism based on 'mixed' or 'social market' economies.³¹

THE CORPORATION AND CORPORATE GOVERNANCE IN THE POST-WAR PERIOD

Central to the idea that a new 'good' form of capitalism had emerged were perceived changes in the practices and cultures of the large corporations that dominated the economy. The managers of these corporations, it was believed, had acquired much greater discretionary power as a result of the weakening of both the *internal*

²⁹ A Hansen, 'Economic Progress and Declining Population Growth' (1939) 29 *American Economic Review* 1 at 4. Unemployment in the US still stood at over 15% in 1940. See also A Hansen, *Full Recovery or Stagnation* (WW Norton, 1938). Hansen's argument was that there was, for various reasons, a shortage of investment opportunities. His principal opponent in the debate was Joseph Schumpeter.

³⁰ The term was coined by JK Galbraith, *American Capitalism: The Concept of Countervailing Power* (Houghton Mifflin 1952). See also S Brooke, 'Atlantic Crossing? American Views of Capitalism and British Socialist Thought 1932-62' (1991) 2 *Twentieth Century British History* 107-36.

³¹ As A Shonfield showed in his *Modern Capitalism: The Changing Balance of Public and Private Power* (Oxford UP 1965), although there were differences between the capitalism of this period, they all had certain features broadly in common: a rejection of laissez-faire, and a belief in the positive power of the state and a guided, planned capitalism.

(shareholder) and *external* (market) pressures on them to profit maximise. The internal pressures had been eroded by the growth in, and dispersal of, corporate shareholding. This, it was claimed, most famously by Berle and Means in *The Modern Corporation and Private Property*³², had generated a separation of ownership and control. In many of the large corporations that dominated the economy, ever more numerous and dispersed shareholders could no longer compel managers to profit maximise. At the same time, it was argued, the external pressures on managers had been diminished by the replacement of highly competitive markets populated by numerous relatively small firms by much less competitive, oligopolistic and/or monopolistic markets populated by a small number of very large firms. In 'most sectors of the American economy', Galambos explains, 'oligopoly prevailed and, with it, competitive practices that downplayed short-term price competition and emphasized competition through product and process innovation and through new forms of marketing'.³³ In these sectors, the argument ran, market prices had to a significant extent been replaced by 'administered prices', market co-ordination by planning (both by the state and by corporations themselves), and competitive capitalism by 'monopoly capitalism'.³⁴ Managers were further insulated from capital market pressures by their use of internally generated corporate funds as their primary source of new investment capital.

The result, it was argued, was that the market- and shareholder-imposed, profit maximising logic of capitalism operated in a more muted and restrained manner, giving managers significantly more decision-making discretion.³⁵ But how were they using it? There emerged two rather different accounts of what came to be called 'managerialism', one 'sectional', the other 'non-sectional'.³⁶ The sectional version, exemplified by James Burnham's *The Managerial Revolution*, described the emergence, in a variety of guises, of powerful new managerial classes acting largely out of self-interest. Although Burnham's ideas were attractive to many on the free market right, who liked the way he lumped together Stalinism, Nazism and the New Deal as examples of the drift towards totalitarian 'managerial societies', most rejected his claims.³⁷ By contrast, the non-sectional version of managerialism suggested that managers, under pressure from labour, governments and the wider public, were spurning profit maximisation and taking account of the interests not only of

³² A Berle & G Means, *The Modern Corporation and Private Property* (Macmillan 1932). The idea that there had been a separation of ownership and control in the growing number of large joint-stock corporations long predates this. It can be traced as far back as Adam Smith and Karl Marx. In the decades before Berle and Means it figured in the work of Thorstein Veblen and Walter Lippman in the US, and the RH Tawney, DH Robertson, and Keynes in the UK.

³³ L Galambos, 'The US Economy in the Twentieth Century' (1996) 3 *Cambridge Economic History of the United States* 927 at 942.

³⁴ See P Baran & P Sweezy, *Monopoly Capital* (Monthly Review Press, 1966).

³⁵ In the words of the Harvard economist Carl Kaysen, 'managers possess great scope for decision-making unconstrained by market forces': 'The Social Significance of the Modern Corporation' (1957) 47 *American Economic Review* 311 at 316.

³⁶ T Nichols, *Ownership, Control and Ideology* (Allen & Unwin, 1969) 43.

³⁷ J Burnham, *The Managerial Revolution* (John Day, 1941). Burnham's work greatly influenced Orwell and his novel *1984*.

shareholders but of employees, customers, local communities and society more generally.³⁸ By the 1950s, in the US and the UK, this had become the dominant view of what managers *were* doing and *should* be doing. In the US this view was exemplified in the work of Berle himself, and in the UK in the work of the doyen of twentieth century company lawyers, LCB Gower.

In the 1930s Berle had engaged in a famous debate with another American corporate lawyer, Merrick Dodd, about the duties of corporate directors. Berle supported shareholder primacy for pragmatic reasons. Dodd, on the other hand, argued that directors owed duties to society as a whole, not merely to shareholders.³⁹ By 1954, shortly after the decision in *A P Smith Manufacturing Co v Barlow*⁴⁰, Berle announced that the argument had 'been settled (at least for the time being) squarely in [Dodd's] favour': corporate powers were held in trust by managers 'for the whole community'.⁴¹ The shift in Berle's position was prompted by his belief, shared with many others, that managers, under less pressure from shareholders and markets, had become subject to a range of new pressures emanating from government, labour and public opinion that were forcing them to moderate their behaviour and abandon the single-minded pursuit of profit.⁴² Memories of the Great Depression and the benefits of war-time state planning, together with the threat of communism and greater government intervention in business affairs, added to the pressures on managers to moderate their behaviour and curb the excesses of capitalism.⁴³ In William Bratton's words, 'managers were caught inside a web of countervailing powers and had no way to get out of control'.⁴⁴

The resulting changes in corporate managerial practice were reflected in, and reinforced by, changes in corporate culture. In their public statements a growing number of managers accepted that they had wider social responsibilities and indicated they thought this perfectly appropriate given the changing nature and role of corporations in society: corporations were now entities with social and political – as well as economic – powers and functions.⁴⁵ For Berle, this was manifested in the emergence of a 'corporate conscience'.⁴⁶ There were, of course, opposition voices –

³⁸ Paradoxically, Burnham popularised 'managerialism', but Berle's non-sectional version of it, not his own sectional version.

³⁹ EM Dodd, "For whom are corporate managers trustees?" (1932) 45 Harvard Law Review 1147; A Berle, 'For Whom Corporate Managers are Trustees' (1932) 45 Harvard Law Review 1365.

⁴⁰ 98 A.2d 581 (N.J. 1953). Somewhat ironically, Berle represented AP Smith in this case.

⁴¹ A Berle, *The 20th Century Capitalist Revolution* (Macmillan, 1955) 137.

⁴² Berle wrote of the emergence of a 'public consensus' to this effect: see A Berle, *Power without Property* (Harcourt, Brace, 1959) 110-116.

⁴³ In 1948, for example, Donald David, Dean of Harvard Business School (HBS), suggested that good management was crucial to a capitalist victory over communism: cited in R Khurana, *From Higher Aims to Hired Hands* (Princeton, 2007) 202-03. In similar vein, others saw business social responsibility as vital in the struggle to resist greater government intervention in the economy: see Khurana 441. See also H Wells, 'Corporation Law is Dead' (2013) 15 University of Pennsylvania Journal of Business Law 305 at 326-27, 331-32.

⁴⁴ WW Bratton, 'The Separation of Corporate Law and Social Welfare' (2017) 74 *Washington & Lee Law Review* 767 at 770-71. See also Berle, *Power without Property*, note 42.

⁴⁵ See Berle, *20th Century*, note 41, 25-40.

⁴⁶ Berle, *Power without Property*, note 42, 90-91.

support for traditional profit-centred business values continued to be voiced - but it is clear from the contemporary literature that, rhetorically at least, these sorts of views about the corporation and corporate governance were in the ascendancy. The pages of the *Harvard Business Review*, for example, were littered with managerial assertions about the wider social responsibilities of business, about the professional and service-oriented nature of management, and about the social need to, and appropriateness of, tempering the profit motive and balancing different interests. These sorts of public statements convinced many that managers were becoming 'quasi-public servants', playing a role 'as economic and social allocators, actively assuming public functions' as 'new industrial statesmen'. Hence the ideas that this was the 'golden age of American management', and that a socially responsible business elite (a world of 'innovative technocrats') and socially responsible corporations were emerging.⁴⁷ The changes in managerial theory and practice, however, had limited impact on US corporate law.⁴⁸

In the UK, Gower similarly argued that directors were now regularly taking account of non-shareholder interests in their decision-making and suggested that although this was not sanctioned by law it was perfectly legitimate and supported by public opinion. Shortly after the publication of his seminal *Principles of Modern Company Law* in 1954, Gower visited Harvard and wrote a couple of articles for the *Harvard Law Review*. The first was a review of a book by Emerson and Latham which explored the possibility of restoring 'shareholder democracy', meaning shareholder control of large corporations. A few years earlier in the UK, this notion had figured prominently in the deliberations and recommendations of the Cohen Committee on company law reform.⁴⁹ In the review Gower openly questioned Emerson and Latham's belief that a restoration of shareholder control was a 'Good Thing'. Was it 'not time', he asked, 'to recognise that shareholder democracy, with its exclusive emphasis on the profit-making element in corporate activity, has a slightly old-fashioned ring?' It was only when Emerson and Latham suggested that 'the interests of shareholders [might] not be the only interests ... that must be recognised by today's publicly held corporation' and that 'the interests of labor, of the consumer, [and] of the country as a whole' might also be worthy of consideration that Gower thought they had struck a 'modern note'.⁵⁰

A few months later he wrote a second article on the attempted take-over of the Savoy Hotel Ltd by the property developer Harold Samuel.⁵¹ The incumbent directors

⁴⁷ Management, according to Carl Kaysen, 'sees itself as responsible to stockholders, employees, customers, the general public, and, perhaps most important, the firm itself as an institution', note 35 at 313. This idea underpinned the belief that managers were emerging as a neutral, disinterested, technocratic elite. See also Bratton, note 44 at 770-71

⁴⁸ See Wells, note 43 at 311.

⁴⁹ The desire to restore shareholder control underlay the Cohen Committee's recommendation that shareholders should be able to remove directors by simple majority vote: Board of Trade, *Report of the Committee on Company Law Amendment* (Cmd. 6659, 1945), para 130.

⁵⁰ LCB Gower, Review of F Emerson & F Latham, *Shareholder Democracy* (Cleveland: Western Reserve University 1954), in 68 *Harvard Law Review* (1955), 922 at 927.

⁵¹ Conditions in England at this time were unusually favourable to those, like Samuel, who sought to take control of companies with undervalued shares, for the government's post-war policy of 'voluntary'

successfully repelled the take-over by selling one of the company's major assets and leasing it back with covenants restricting its use. But there were misgivings about this. 'Few of those who [had] subscribe[d] their money to joint-stock companies', wrote a *Times* leader-writer, 'supposed that the managerial revolution had gone quite so far as that'. Two Board of Trade investigations were held, the second of which concluded that although the directors genuinely believed that they were acting in the best interests of the company, they had used their powers for an improper purpose. Gower agreed that the directors' actions were invalid: once they had conceded that they owed their duties only to the company's shareholders 'present and future', 'the impropriety of their actions seems obvious'. What he regretted was that the directors had not 'come out boldly with an argument that they owed duties to the company's employees and customers and to the public, as well as to the shareholders, and that their actions were justified as the only way in which the best interests of all these classes could be protected against the misguided threats of the would-be controller'. After all, he argued, in the twenty years since the Berle-Dodd debate, 'public opinion' in England seemed to have 'hardened in favour of Dodd's view'. It had become 'almost an accepted dogma', on both left and right, 'that management owes duties to the four parties of industry (labour, capital, management and the community)'. Gower recognised, however, that this sentiment had not yet 'crystallised into law'.⁵² Public opinion and directorial practice in both jurisdictions were thus at odds with the letter of the law.

In the second edition of *Principles*, published in 1957, Gower went even further. There was, he argued, 'growing recognition that if the major part of industry and commerce is to be left to un-nationalised corporate enterprise, substantial modifications will have to be made in the legal framework of companies'. Writers of 'very different political leanings', he explained, had expressed the view that 'company law is unreal in that it treats the company as owing duties only to its members, whereas in fact its relationships with its workers, the consumers of its products, and the community as a whole, are of equal if not greater importance'.⁵³ The legal position – that directors could have regard to 'outside interests' only in so far as they furthered 'the primary object of making profits for the shareholders' – was, Gower suggested, 'increasingly anachronistic'. The reality was that 'directors habitually have regard to [non-

dividend limitation – which had, according to Gower, been 'loyally followed by most boards of directors' (itself indicative of the corporate governance and wider political climate at the time) – meant that the shares of many companies were being quoted at below the value of the underlying assets. There were, therefore, quick gains to be had, especially as capital gains were not normally taxable. See G Bull & A Vice, *Bid for Power* (Elek Books, 3rd ed., 1961).

⁵² LCB Gower, 'Corporate Control: The Battle for the Berkeley' (1955) 68 *Harvard Law Review* 1176-1193. US public opinion, he argued, did not support the view that 'corporations exist for the sole purpose of making profits for their stockholders'. Gower nevertheless saw virtue in takeovers in that they stopped the emergence of self-perpetuating managerial oligarchies and acted as a spur to efficiency. This led him (and others) to dissent from the recommendations of majority of the Jenkins Committee on the question of shares with restricted or no voting rights: Board of Trade, *Report of the Company Law Committee* (1962) Cmd 1749, 207-10.

⁵³ LCB Gower, *Principles of Modern Company Law* (Stevens, 2nd ed., 1957) 56.

shareholder] interests', so much so that it was 'becoming common form for them to declare that industry owes duties to employees, consumers and the public, as well as to members'.⁵⁴ The nationalised (public) corporation merely 'recognise[d] openly what the public company is coming to recognise tacitly: that an enterprise should be run for and on behalf of the public as a whole and not merely for the benefit of a small section of it represented by the shareholders'.⁵⁵

That views of this sort were widely shared became clear a few years later following the decision in *Parke v Daily News*.⁵⁶ The issue was whether it was legitimate for the directors of a company which was about to cease trading to make gratuitous payments to the employees who were about to lose their jobs. Reflecting the power of labour during this period, one of the principal reasons the directors were proposing to do this was to minimise the risk of trade union opposition to a proposed takeover of the defendant company's newspapers.⁵⁷ The directors were challenged by a shareholder claiming it was *ultra vires* and incapable of shareholder approval. Plowman J agreed. The duty of the directors was to 'the company', meaning the 'shareholders as a general body', and however 'laudable' the directors' motives and 'however enlightened from the point of view of industrial relations', they were not legally permitted to make the payments. Commenting on the decision, Bill Wedderburn suggested that English law was now not only out of line with directorial practice but many other jurisdictions where directors were 'allowed, or required, to consider the interests of persons other than the shareholders (eg., the nation's, or the employees' interests)'. It was, he 'respectfully suggested', 'time for the Court of Appeal to put a twentieth-century face upon this part of English law'.⁵⁸ Robert Pennington agreed. 'An employee of many years standing', he suggested, 'surely has as recognisable an interest in the continuance of his employment as a shareholder has in the continued existence of his shares, and if both interests cease to exist on the liquidation of the company, there seems no reason why the company's assets should be appropriated to satisfy the shareholders' interests alone'. Was it really satisfactory 'that directors should be required by law to manage the company's affairs solely with a view to the financial benefit of shareholders'? There were other interests deserving of recognition: 'It would, surely, be more in accordance with modern views about the functions of business enterprises in society to relieve directors from this myopia which the law forces on them'. Why not legally require the directors of public companies to take account of the interests of employees and the wider public, as well as of shareholders, as in Germany?⁵⁹ This was stakeholding *avant la lettre*.

⁵⁴ Gower, *Principles*, note 53, 475-76. This was reiterated in the 3rd edition of the book (1969) 522.

⁵⁵ Gower, *Principles*, note 53, 231.

⁵⁶ [1962] 8 WLR 566; [1962] 2 All ER 929.

⁵⁷ This is detailed in the case report and highlighted in the Pennington case note: RR Pennington, 'Terminal Compensation for Employees of Companies in Liquidation' (1962) 25 *Modern Law Review* 715.

⁵⁸ KW Wedderburn, 'Ultra Vires and Redundancy', (1962) 20 *Cambridge Law Journal* 141 at 143, 146.

⁵⁹ Pennington, note 57, at 718-19.

In 1979 and the eve of Margaret Thatcher and the neoliberal revolution, Gower was still expressing views of this sort. In the 4th edition of *Principles*, published in that year, he noted that, in a parliamentary debate on what was to become the 1967 Companies Act, the then President of the Board of Trade, Douglas Jay, had indicated that the government intended to 'legislate for wider reforms in the structure and philosophy of our company law' based on a re-examination of 'the whole theory and purpose of the limited joint stock company, the comparative rights and obligations of shareholders, directors, creditors, employees and the community as a whole'.⁶⁰ 'Unfortunately', Gower lamented, 'nothing of the sort emerged', with the result that 'at present ...our company legislation is in greater disarray than at any time since the beginning of the century – both in content and in form'.⁶¹ Elsewhere in the book he argued that in the US the belief that companies carried such responsibilities had become 'widely held'⁶², noting the CBI had also 'recognised the need for a public company to accept social responsibilities, over and above what the law require[d], in regard to such matters as the "environmental and social consequences of its business activities"'. Gower also recognised, however, that these ideas 'posed difficulties for directors and managers whose over-riding legal duty is still to act bona fide in what they consider to be the best interests of their company, which, at present, is translated by English law as the long-term interests of their shareholders'.⁶³ The insertion of '*at present*' reflected Gower's hope that the law might change. Later in the book, he reiterated his view that directors not only *should* have regard to the interests of employees, consumers and the wider society, as well as of shareholders, but that they *did* this as a matter of empirical fact. For Gower, the lack of acknowledgement of 'the position of the worker in the corporate structure' was 'anachronistic' and a 'failure of company law'. He welcomed clause 46 of the 1978 Companies Bill, which later became s46(1) of CA1980 and s309(1) of CA 1985, as 'desirable'.⁶⁴

CAPITALISM TRANSFORMED?

There is no doubt that during the post-war period the operating logic of capitalism was tempered. Although belief in profit maximisation was still alive and well in some quarters⁶⁵, capital's freedom of movement was constrained and labour was relatively strong, with the result that managers often had little choice but to bend, at least to an extent, to other interests. Class compromise was facilitated by consistently good levels of economic growth (OECD countries enjoyed real GDP growth of 4-5% per annum in

⁶⁰ House of Commons debate 14 February 1967, vol 741, column 359.

⁶¹ LCB Gower, *Principles of Modern Company Law* (4th ed., 1979), 56.

⁶² Gower, note 61, 62-63.

⁶³ Gower, note 61, 62-63. Gower was referring here to the CBI's 1973 Watkinson Report, *The Responsibilities of the British Public Company* (1973), which was designed to stave off the threat of industrial democracy posed by the EC's Draft 5th Directive on Company Law, OJ [1972] C131/49, which advocated adoption of the German two-tier board structure. See S Wheeler, 'Gone and almost entirely forgotten: the Watkinson Report', (2009) 60 Northern Ireland Legal Quarterly 263.

⁶⁴ Gower, note 61, 66-67, 578-80. Section 309 read: 'The matters to which the directors of a company are to have regard in the performance of their functions include the interests of the company's employees in general, as well as the interests of its members'.

⁶⁵ See, for example, FX Sutton et al, *The American Business Creed* (Harvard UP, 1956).

the 1950s and 60s). The resulting changes in corporate practice generated further changes in business culture and education, which themselves fed back into practice. Crucially, the dilution of shareholder primacy by corporate managers was increasingly seen in many quarters not only as a fact of life but as legitimate. Was it really appropriate to continue to regard passive, *rentier* shareholders as 'owners' entitled to have corporations run in their exclusive interests and to regard these powerful oligopolistic enterprises as purely 'private' entities?⁶⁶

Alongside these more 'socialised' corporations, there emerged a softer, more inclusive, less rapacious, less unequal, less scandal-ridden, more humane, and 'acceptable' form of capitalism. During this period, the distribution of the social product was determined not only by market forces but by complex tripartite negotiations between capital, labour and the state. The forms of negotiation and distribution varied from place to place, as did the outcomes, but, overall, as Piketty and others have documented, income and wealth inequality declined. Underpinning this softening of the logic of capitalism and moderation of corporate behaviour was, of course, the changed balance of class forces and the changed legal, financial and political structures that it brought. It is with some justification that Jeffrey Gordon claims that 'the 1950s were the high-water mark' of both 'managerialism in corporate governance' and 'stakeholder capitalism in the United States'.⁶⁷ The same was true of the UK.

It is not insignificant, perhaps, that the loosening of the competitive logic and market imperatives of capitalism seems to have coincided with a decline in the incidence of serious managerial misbehaviour. Brian Cheffins observes that although there were examples of managerial misconduct in the 1950s,⁶⁸ 'corporate scandals were rare, despite the relative absence of 'shareholder vigilance'.⁶⁹ Richard Roberts agrees, arguing on the basis of his examination of reporting in the *Financial Times* that while there had been 'a string of financial scandals and debacles' in the first thirty or so years of the century, the 'decades from the mid-1930s to the mid-1960s were notably free of

⁶⁶ On this, see P Ireland, 'Financialization and Corporate Governance', (2009) 60 *Northern Ireland Legal Quarterly* 1 at 8-18. In Europe the post-war decades saw many support enhanced workers' rights and representation (an idea culminated in the UK in the Bullock Report of 1978), with some advocating the relegation of shareholders to the status of preferred creditors. A 'close examination' of the 'rights conferred by shares and debentures', Gower argued in 1957, revealed the 'impossibility of preserving any hard and fast distinction between them which bears any relation to practical reality': Gower, note 53, 321-22. In the US, Robert Calkins, Dean of Columbia School of Business in the 1940s, indicated that he didn't think large corporations could be neatly characterised as either 'public' or 'private'. In similar vein, the sociologist Philip Selznick listed the institutions of industry among those he thought had 'become increasingly public in nature': both quoted in R Khurana, *From Higher Aims to Hired Hands: The Social Transformation of American Business Schools and the Unfulfilled Promise of Management as a Profession* (Princeton UP, 2007) 201.

⁶⁷ JN Gordon, 'The Rise of Independent Directors in the United States, 1950-2005', (2007) 59 *Stanford Law Review* 1465 at 1511.

⁶⁸ For some examples, see B Cheffins, 'Corporate Governance since the Managerial Capitalism era', (2015) 89 *Business History Review* 717 at 721.

⁶⁹ B Cheffins, 'How Corporate Governance moved to the forefront of Management', LSE Blog contribution:
<http://eprints.lse.ac.uk/73571/1/blogs.lse.ac.uk-How%20corporate%20governance%20moved%20to%20the%20forefront%20of%20management.pdf>

major scandals, both in the City and Wall Street'.⁷⁰ In similar vein, Manfred Bienefeld notes that between 1948 and 1973, there wasn't a single major banking crisis as defined by the World Bank, in stark contrast to what had happened before and what has happened since.⁷¹ This was the wider context in which Heath made his remarks.

More contentious was the question of whether the changes marked a major systemic shift. In the US, Berle clearly believed that the changes were both radical and permanent. The rise of the corporate economy and dispersal of shareholdings, he argued, had disempowered shareholders, empowered managers and freed industry from the naked pursuit of profit. It had also forced the state to intervene to ensure that this newly acquired managerial power was used in the interests of society as a whole. The 'institution of private property' and 'in limited measure the institution of the "market economy"' had been maintained⁷², but there had been a 'twentieth century capitalist revolution'.⁷³ By the 1950s the idea that the US had become a 'people's capitalism' was taking root.⁷⁴ In the UK, the influence of these ideas was apparent in the intellectual struggles that racked the Labour Party. As early as 1940 Evan Durbin, anxious to reduce the influence of Marxist ideas within the Party, was drawing on Berle and others to suggest that a new, transformed, more 'socialised' variety of capitalism was coming into existence.⁷⁵ After Durbin's death, the baton was taken up by another 'revisionist' Labour Party intellectual, Anthony Crosland.

Crosland believed that in the post-war years the traditional logic of capitalism had been irrevocably undermined. Like Berle, he thought that shareholders had been largely disempowered by the rise to dominance of joint-stock corporations and transfer of control to 'non-owning managers'. 'Top management', he argued, 'is [now] independent not only of the firm's own shareholders, but increasingly of the capitalist or property-owning class as a whole, including financial institutions'.⁷⁶ At the same time the rise of strong trade unions and powerful 'anti-capitalist' political parties had, in a period of low unemployment, seen labour emerge as a formidable counter-weight to capitalist power, with the state brokering relations between them and playing an ever larger role in managing the economy. Co-operation was becoming as important as competition. The result was a 'quite different configuration of economic power'

⁷⁰ R Roberts, 'Financial Times – Scandals and Debacles': <http://gale.cengage.co.uk/images/FT%20Scandals%20and%20Debacles.pdf>.

⁷¹ M Bienefeld, 'Suppressing the Double Movement to secure the dictatorship of finance', in A Bugra & K Agartan (eds.) *Reading Karl Polanyi for the Twentieth First Century* (Palgrave, Macmillan, 2007) 13 at 21-22.

⁷² A Berle, *The American Economic Republic* (Harcourt, Brace 1963) 99.

⁷³ Berle, *The 20th Century*, note 41; Berle, *Economic Republic*, note 72, 169

⁷⁴ For a discussion and debunking of this, see A Preis, 'Myth of "People's Capitalism"' (1962) 23 *International Socialist Review* 3.

⁷⁵ E Durbin, *The Politics of Democratic Socialism* (Routledge London, 1940). He also drew on earlier Labour Party intellectuals like RH Tawney.

⁷⁶ CAR Crosland, *The Future of Socialism* (1956, revised edition, Schocken Books, New York, 1963), 15. CAR Crosland, 'The Transition from Capitalism' in RHS Crossman, *New Fabian Essays* (Turnstile Press 1952) 33 at 35, 38-41.

which was impacting on business attitudes and ethics. 'The decline of capitalist control [did] not mean that the profit motive ha[d] disappeared', but maximum profit was no longer pursued 'at all costs'. Echoing Gower, he argued that 'private industry' had become 'very sensitive to public opinion' and 'traditional capitalist ruthlessness' had 'largely disappeared'. 'Most businessmen' were now 'tinged by ... more social attitudes and motives'.⁷⁷ With 'private industry ... at last becoming humanised', capitalism was 'undergoing a metamorphosis into a quite different system'.⁷⁸ 'Capitalist features and attitudes no longer predominated', and it was, therefore, 'misleading' to refer to Britain as a capitalist society.⁷⁹ A 'post-capitalist society' was emerging.⁸⁰

Crucially, for Crosland, this meant, as it had for Keynes many years earlier⁸¹, that seeking to take industry into public ownership (nationalisation) was no longer necessary to achieve socialist goals. Nor indeed were radical and politically contentious changes to corporate rights structures. In Crosland's view, ownership was 'unimportant'.⁸² As a result, when it came making changes to the legal position of shareholders, workers and the community, Crosland confessed to feeling 'rather neutral', as he 'doubt[ed] whether a major change [would be] worthwhile in practice, or indeed whether the legal issue really much matters'.⁸³ He favoured greater consultation of workers at local level (but not 'joint management'), 'a more equitable distribution of non-pecuniary privileges and less social gap' between staff and labour, and greater involvement of trade unions in policy-making at national level ('high-level industrial democracy'). He rejected proposals for government and worker directors. Trying to effect 'major changes in company law' which would diminish or eliminate the residual proprietary rights of shareholders would simply not be worth the effort: large companies were already being 'socialised', changing the law 'would make no difference to the underlying reality'.⁸⁴ This did not prevent industrial democracy becoming a major issue in the 1960s and 70s, but the proposals of the Bullock Report⁸⁵ for two-tier boards were diluted by the Labour Government in a subsequent White Paper⁸⁶ and discarded altogether when the Conservatives returned to power in 1979.

NEOLIBERALISM: THE RISE TO DOMINANCE OF FINANCIAL CAPITAL

⁷⁷ Crosland, *Future of Socialism*, note 76, 17-22. Later in the book, he wrote: 'what is wrong with large public companies to-day ... is not a lack of "public responsibility"', 271.

⁷⁸ Crosland, 'The Transition from Capitalism', note 76, 35.

⁷⁹ Crosland, *Future of Socialism*, note 76, 23, 34-35.

⁸⁰ Crosland, 'The Transition from Capitalism', note 76, 37-38.

⁸¹ JM Keynes, 'The End of Laissez-Faire' (1926). Available at: <https://www.panarchy.org/keynes/laissezfaire.1926.html>

⁸² Crosland, *Future of Socialism*, note 76, 251.

⁸³ Crosland, *Future of Socialism*, note 76, 265

⁸⁴ Crosland, *Future of Socialism*, note 76, 271-76.

⁸⁵ Department of Trade, *Report of the Committee of Inquiry on Industrial Democracy*, Cmnd. 6706 (HMSO, 1977).

⁸⁶ Industrial Democracy, Cmnd. 7231 (HMSO, 1978).

By the early 1970s, however, cracks were beginning to appear in the house-trained, social democratic model of capitalism constructed in the post-war years. With profitability falling and stagnation threatening once more, the post-war accommodation between capital and labour came under renewed pressure. Initially, the distributional conflicts that resulted were tempered by wage rises for labour paid for by price increases. But this merely displaced the problem, which now manifested itself in rising inflation. Growing industrial unrest, amplified by the relatively poor performance of British capitalism, provided the backdrop to the Donovan Commission (1965-68)⁸⁷, *In Place of Strife* (1969)⁸⁸ and the Industrial Relations Act 1971.⁸⁹ As noted earlier, it also provided the immediate backdrop to the 1973 debate in which Heath, asked to condemn Lorrho, spoke of the 'unacceptable face of capitalism'.

Profitability problems and the impact on capital of the countervailing power of labour underlay the backlash that began to gather force in the 1970s. This backlash was exemplified by a memorandum written by Lewis Powell for the US Chamber of Commerce in 1971, shortly before he became a Supreme Court Justice. Entitled 'Attack on American Free Enterprise System', it called on corporate America to aggressively reassert itself.⁹⁰ Emblematic of the fightback that capital began to launch against labour at this time, the sentiments expressed in the Powell memorandum foreshadowed the emergence of a range of right-leaning think tanks promoting free market ideas and policies that prioritised privatisation, marketization, selective deregulation and the interests of capital over labour. In a highly complex, multi-faceted process of sustained institutional transformation with inter-twined economic, legal, political and ideological dimensions, the fetters on capital (and especially financial capital) were removed and the socially democratic capitalism of the post-war period gradually dismantled.

There has been a tendency to portray these changes – and particularly the globalisation of markets, and especially financial markets – as largely inevitable, as the products of unstoppable technological and market forces (the rise of global telecommunications, information technology, containerisation and so on), rather than the products of political choices made by states.⁹¹ This belief underlies the idea that 'there is no alternative' (TINA). But, as Susan Strange says, 'it is very easily forgotten that [international financial] markets exist under the authority of and by permission of the state, and are conducted on whatever terms the state may choose to dictate, or allow'.⁹² Indeed, it is the political dimensions of 'globalisation' – a term which is often used in such a way as to conceal these dimensions - that has led David Harvey to

⁸⁷ Report of the Royal Commission on Trade Unions and Employers' Associations, Cmnd 3623 (HMSO, 1968).

⁸⁸ *In Place of Strife: A Policy for Industrial Relations*, Cmnd. 3888 (HMSO, 1969)

⁸⁹ Industrial Relations Act 1971, c.72.

⁹⁰ <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf>

⁹¹ See E Helleiner, *States and the Re-emergence of Global Finance* (Ithica: Cornell University Press, 1994) vii, 1.

⁹² S Strange, *Casino Capitalism* (Oxford: Basil Blackwell, 1986) 29.

argue that neoliberalism is best viewed as a counter-revolutionary 'political project' aimed at reducing the power of labour and strengthening the position of capital.⁹³

There is undoubtedly much to be said for this view. Recent decades have seen a dramatic erosion of the post-war institutional framework and its collective social protections. Not only has the reach of markets been extended through privatization and commodification, market forces have been deliberately intensified in carefully selected areas.⁹⁴ The changes have taken locally diversified forms but their effect has been broadly the same: to alter the balance of power between capital and labour in favour of the former. Labour has been weakened by the assault on trade union and employee legal rights, and by the changes associated with 'globalisation', particularly the shifting of production to low wage regions and importation of cheaper foreign labour into domestic markets. At the same time, the fetters on financial capital have been removed. In 1973, the year of the Lorrho scandal, an international agreement to move from fixed to floating exchange rates marked the beginning of the end for Bretton Woods. The gradual abandonment of controls over international capital movements followed. We have moved from tightly regulated, nationally-based financial systems centred on commercial banking to a loosely regulated, global financial system centred on investment banks. Genuinely international capital markets have emerged and, aided by computerization, there have been phenomenal increases in capital flows. Innovation is incessant. With states much more vulnerable to capital flight, governments have lost much of the policy autonomy they enjoyed in the post-war decades. This has undermined the ability of democracy to rein in capitalism.⁹⁵ The social and political consequences of stagnant or declining real wages, diminishing social provision and protection, the disempowerment of national citizenries, and subordination of states to global financial markets and technocratic supranational institutions are now becoming manifest.

During this period, the corporate legal form changed relatively little, though the Companies Act 1948 did effect a significant strengthening of shareholder rights by enabling them to remove directors by simple majority vote whereas before a 75% majority had been required.⁹⁶ As Andrew Johnston observes, shortly after this 'the hostile takeover burst onto the scene'.⁹⁷ The power of shareholders has, however,

⁹³ D Harvey, *A Brief History of Neoliberalism* (OUP, 2005). See also: <https://www.jacobinmag.com/2016/07/david-harvey-neoliberalism-capitalism-labor-crisis-resistance/>

⁹⁴ Thus the full force of market forces has been unleashed on labour, but not always on capital, as the bank bailouts that followed the 2007-08 crash showed.

⁹⁵ Also worthy of note here are the 'four freedoms' established by the EU and the so-called 'New Constitutionalism' - new mechanisms for investor protection that have been developed using instruments such as Bilateral Investment Treaties. On the latter, see D Schneiderman, *Constitutionalizing Economic Globalization* (CUP, 2008).

⁹⁶ Section 184, CA 1948.

⁹⁷ A Johnston, 'The Shrinking Scope of CSR in UK Corporate Law' (2017) 74 Washington & Lee Law Review 1001 at 1005, 1009-10, 1016-18. See also L Hannah, 'Takeover Bids in Britain before 1950', (2006) 16 Business History 65. The Savoy Hotel takeover discussed by Gower (see earlier) being an example.

been augmented still more by developments outside company law, a couple of which are worth mention. Firstly, the rules on take-overs were modified by the introduction in 1968 of the City Code on Takeovers and Mergers, so as to prohibit directors from acting to frustrate bids in the interests of employees and other stakeholders. This helped to pave the way for leveraged-buy-outs and has served to intensify the financial market pressures to which corporate managers are subject.⁹⁸ Secondly, the re-concentration of previously dispersed holdings of shares and other forms of financial property in financial institutions (pension funds, mutual funds, hedge funds and the like) has re-empowered financial property owners, including shareholders, as a class. As late as the mid-1960s in the US, physical persons held 84% of publicly listed shares. They now hold less than 40%. In the UK, it has been estimated that by 2014 individuals owned only 12% of quoted shares.⁹⁹ Acting through their institutional representatives, shareholders have been able to make much more effective use of their residual proprietary rights to (re)assert their power in and over corporations, shaping and in some cases directing the behaviour of executives towards ‘maximising shareholder value’.

This institutional power is exercised both *directly* in individual companies and *indirectly* over the corporate sector as a whole in globalized financial markets. Indeed, the operations of the latter have rendered it ubiquitous.¹⁰⁰ The competition both between and within institutions - portfolio managers are routinely subjected to regular (quarterly) market-based performance evaluation – has intensified the market pressures on corporate managers to deliver ‘shareholder value’. Permanently under threat, managers often have little choice but to prioritise dividends and share price over investment in new plant and equipment, in research and development, and in developing the skills of the workforce. Failure to meet the expectations of financial institutions and security analysts renders corporations vulnerable to takeover and managers vulnerable to removal.¹⁰¹ This transfer of power from boardrooms to financial markets has seen a highly financialized, share-price-focused logic imposed on corporate managers. There has been a steady decline in the share of profits

⁹⁸ See A Johnston, Takeover Regulation: Historical and Theoretical Perspectives on the City Code, (2007) 66 Cambridge Law Journal 422. As he points out, s309 CA1985 did not operate in the takeover context: Johnstone, ‘Shrinking Scope’, note 98, 1024-26. See also, P Davies, ‘Shareholder Value, Company Law, and Securities Markets’, in K Hopt & E Wymeersch (eds), *Capital Markets and Company Law* (OUP, 2003) 261.

⁹⁹ See S Celik and M Isaksson, ‘Institutional investors and ownership engagement’, *OECD Journal: Financial Market Trends*, Volume 2013/2, 93; ONS Statistical Bulletin, *Ownership of UK Quoted Shares: 2014*. In the UK, foreign ownership has increased dramatically, rising from 7% to 53% between 1963 to 2012. Around 46% of this foreign ownership is based in North America, and most of this is institutionally held: ONS, 11-12.

¹⁰⁰ They also exert considerable power over states: see Wolfgang Streeck, *Buying Time* (2014).

¹⁰¹ As Grahame Thompson says, ‘even the largest global firms can be stalked by activist investors – hunted by private equity or sovereign wealth funds seeking added shareholder value extraction ... Few companies, however large or internationalised, are immune from the threat of takeover’: G Thompson, *The Constitutionalization of the Global Corporate Sphere* (OUP, 2011)

retained for investment¹⁰², share buy-backs have proliferated, accounting rules have been stretched, financial statements manipulated, and 'externalities' ignored or concealed.

The resulting changes in managerial behaviour have not, of course, only been a matter of externally imposed market imperatives. Executive remuneration has been re-designed to better align the interests of managers and shareholders. Performance related pay (share options, bonuses linked to share price and the like) has encouraged managers to pursue shareholder value maximisation by making it personally very lucrative: since the 1990s executive pay and perks have sky-rocketed. These developments have transformed corporate culture. The image of the ideal executive has changed 'from one of a steady, reliable caretaker of the corporation and its many constituencies to that of a swashbuckling, iconoclastic champion of shareholder value'. The ideals of professionalism developed in American business schools to create 'a managerial class that would run America's large corporations in a way that served the broader interests of society rather than the narrowly defined ones of capital and labor', have been 'swept away'.¹⁰³

These financialized forms of governance have been intensified by the rise of new types of financial institution focused on securing quick financial gains. Beginning in the 1980s, there emerged a number of specialist take-over firms who sought to use borrowed money to gain control of corporations before 'restructuring' them, recapitalising their revenue streams and selling their securities at a profit. These leveraged buyouts (LBOs) rendered even large corporations vulnerable to take over. After dwindling during the 1990s downturn, debt-financed takeovers have enjoyed a resurgence with the emergence of private equity (PE) firms operating with inherently short-termist business models.¹⁰⁴ Eileen Applebaum and Rosemary Batt's comprehensive study of PE in the US suggests that while PE firms occasionally provide the investment and management expertise needed to help to turn companies around or grow, this is exceptional.¹⁰⁵ More usually they use debt to engineer financial deteriorations in the balance sheets of companies which are then used as a pretext for forcing through radical cost-cutting operational changes, usually involving job losses, greater job precarity, cuts to pay and social benefits (like pensions), poorer working conditions, and so on.¹⁰⁶ PE's search for quick capital gains usually has an immediate negative impact on the workforce and communities, both of which tend to be seen as disposable or substitutable. The employees in companies bought by PE, writes Robert Peston, 'frequently undergo massive and unsettling changes in their

¹⁰² See, for example, E Stockhammer, Shareholder value orientation and the investment-profit puzzle, (2006) 28(2) Journal of Post Keynesian Economics 193.

¹⁰³ Khurana, note 43, 3-4, 20.

¹⁰⁴ Typically, a fund is raised, business assets purchased, operations and finances re-engineered, the assets sold and the investment returns distributed.

¹⁰⁵ E Applebaum & R Batt, *Private Equity at Work* (Russell Sage, NY, 2014).

¹⁰⁶ The cost-cutting measures typically include selling off of parts of the company, asset-stripping, outsourcing, and de-unionisation. In the US PE firms also often use loopholes in pension regulations in ways that reduce or destroy the savings of current and future pensioners.

working practices for which the rewards go disproportionately to senior managers and owners'.¹⁰⁷ There is also considerable evidence that PE take-overs often damage the long-term productive health of firms.¹⁰⁸ We shouldn't be surprised by this. 'After many years observing the leaders of this industry', Peston writes, 'I found [it] shocking' that so many of them 'view businesses in a very impersonal and blinkered fashion', seeing them as 'property and chattels, and statistics about cash flows and market shares'. They had 'little empathetic understanding of a business as a social institution wholly dependent on its people'. There was 'an unattractive, cold calculation' to their business style.¹⁰⁹ Crucially, although the practices of these takeover firms vary between countries and represent only a small proportion of the institutional market, their aggressive and highly financialized approach is not only spreading but impacting on corporate practices more generally. They have made an important contribution to the processes whereby financialization has permeated even non-financial corporations, hollowing them out and encouraging managers to see firms as bundles of assets in which production (often now outsourced) is secondary. In this sense, as Julie Froud has pointed out, 'private equity is not a special case'. PE partners have instead acted as 'pioneers who have developed and tested out forms of financial and workforce engineering that have increasingly been normalized by public corporations'. Two noteworthy examples of practices pioneered by PE which have spread across the corporate sector are the use of high levels of debt and tax arbitrage. In Froud's words, there has been 'a kind of convergence of behaviour of organized money', through which the 'cynical financialized behaviour' of financial intermediaries has come to 'play an increasingly important role in shaping economic activity and social life'.¹¹⁰ PE just takes financialized governance 'to the extreme'.¹¹¹

The result has been the emergence of a 'second financial hegemony'¹¹², albeit one which differs radically from its predecessor in that in the first hegemony of the late nineteenth and early twentieth centuries 'on the whole finance was still subordinate to production ... the capital accumulation process continu[ing] to be focused on *industrial* capital', whereas now the relationship has been 'inverted'.¹¹³ Struggling to find profitable outlets for investment in production, capital has sought profit from investment in financial, rather than real productive, assets, hence the huge increases in the financial asset portfolios of non-financial corporations. The highly financialized,

¹⁰⁷ R Peston, *Who Runs Britain* (Hodder, 2008) 44.

¹⁰⁸ The bankruptcy rate of PE companies is far higher than that of public corporations: see interview with Applebaum and Batt: <http://www.nakedcapitalism.com/2014/12/andrew-dittmer-eileen-appelbaum-rosemary-batt-private-equity-really-works.html>. Paradoxically, given the impact of PE on workers (lower wages, fewer jobs, reduced welfare and pension benefits, union de-recognition, and so on), pension funds linked to unions, desperately searching for higher yields to secure the financial viability of pension and health-care funds, have been significant investors in PE firms.

¹⁰⁹ Peston, note 107, 44-46.

¹¹⁰ J Froud, Book Review, (2015) 13 *Socio-Economic Review* 813. PE practices, having begun and developed in the US, are becoming more common in Europe.

¹¹¹ M Hauptmeier, Book Review (2015) 13 *Socio-Economic Review* 816.

¹¹² G Dumenil & D Levy, *Capital Resurgent* (Harvard UP 2004).

¹¹³ P Sweezy, 'The Triumph of Financial Capital' (June 1994) 46 (2) *Monthly Review*.

neoliberal capitalism that has emerged is singularly unconducive to socially responsible or ethical behavior. Partly as a result of the relentlessness and intensity the financial market pressures they face and partly because of a growing culture of greed, managers pursue short term financial performance with little or no regard to, or sense of responsibility for, the long-term future of firms, let alone for the interests of employees (or the employees of subordinate sub-contractors), the communities and societies within which the firms operate, or the environment.¹¹⁴ With financial capital liberated and labour struggling to provide an effective countervailing force, the logic of capitalism and its market imperatives have been not only reasserted but extended and intensified. This has precipitated a cultural descent into Götz Briefs' 'ethics of the least restrained', with the result that what could in 1973 be plausibly described as a mere 'facet' has become much closer to a norm.

We should not, then, be surprised that, on occasions, as in the BHS case, governance descends into blatant looting and asset-stripping. BHS was an extreme case, but it was hardly out of character with the spirit of the age, as the recent collapse of Carillion, 'the very epitome of the modern financialized firm', has shown.¹¹⁵ BHS was truly exceptional only in that it was possible to attach moral (if not legal) culpability to a specific individual and to mobilise public and political opinion against him, forcing a partial replenishment of the company's pension fund. In the normal case, directors are rarely prosecuted¹¹⁶ and shareholders, although continuing to enjoy residual proprietary (and control) rights, are absolved from both legal liability for corporate debts and moral responsibility for corporate misdemeanours. With shares almost always fully-paid-up, *de jure* limited liability has become *de facto* no-liability, and with companies regarded in both law and common sense as reified entities radically separate from their members, shareholders are rarely considered in any way responsible for corporate malfeasance.¹¹⁷ Responsibility for dealing with most of the

¹¹⁴ In the US corporations abandoned earlier policies of "retain and invest" in favor of policies of 'downsize and distribute': see W Lazonick & M O'Sullivan, 'Maximising Shareholder Value: A New Ideology for Corporate Governance', (2000) 29(1) *Economy and Society* 13. In the UK there was a marked upward shift in pay-outs from 13-20% in the 1980s to 20-35% in the 1990s and 2000s: J Froud et al, *Financialization and Strategy* (Routledge 2006) 87-88. The recent collapse of Carillion exemplifies the pitfalls of financialized governance in which 'dividends and share buybacks come at the expense of either wages, employment or investment': Adam Leaver, 'Out of Time: The fragile temporality of Carillion's accumulation model'. Available at: <http://speri.dept.shef.ac.uk/2018/01/17/out-of-time-the-fragile-temporality-of-carillions-accumulation-model/>.

¹¹⁵ Leaver, *ibid*. Carillion went into compulsory liquidation in January 2018, having taken on too many contracts on small margins and racked up debt. The company's rising debt pile did not prevent the board from continuing to misrepresent the company's financial state, or from continuing to pay themselves huge salaries (and bonuses), and rewarding shareholders with very good dividends. In contrast, they did very little to reduce the growing deficit in the pensions fund of its 40,000 global staff. Indeed, Carillion raised dividends every year for 16 years while running up a pensions deficit of over £500m.

¹¹⁶ J Taylor, 'Why have no bankers gone to jail?', *History & Policy* (Policy Papers), 14 November 2013. Available at: <http://www.historyandpolicy.org/policy-papers/papers/why-have-no-bankers-gone-to-jail>

¹¹⁷ On the Janus-faced nature of corporate shares and the way in which they combine proprietary (insider) rights with (outsider) creditors privileges, see P Ireland, 'Corporate Schizophrenia: The Institutional Origins of Corporate Social Irresponsibility', in N Boeger & C Villers (eds), *Shaping the Corporate Landscape* (Hart, 2017).

deleterious consequences of contemporary corporate governance (whether environmental disasters, lost jobs, lower wages, lost pensions, or growing inequality) tends to fall on states – states whose ability to raise taxes to deal with these consequences has been seriously undermined (in part by those very forms of governance) and who are themselves now seriously constrained by financial markets.¹¹⁸ Thus following the Great Financial Crash the costs of financialized governance were socialised, but not the corporations involved.

NEOLIBERALISM: GOOD FOR CAPITAL BUT NOT FOR CAPITALISM?

The sharp rises in income and wealth inequality documented by Piketty and others suggest that the changes in the balance of power between capital and labour, and between capital and states, have, at least in certain respects, served *capital* well. The share of the social product appropriated by the financial-property-owning elite (the '1%' or less who own the vast bulk of these forms of property) has grown.¹¹⁹ This group has succeeded in largely detaching itself from the fate of the societies it has plundered. *Capitalism*, however, has fared less well, continuing to lurch from one crisis to another. In this respect unrestrained capitalism is faring no better than its house-trained predecessor. The crises have moved from place to place and taken a variety of different forms - chronic inflation and then stagflation in 70s, rising unemployment and public debt in 80s, rising private debt in the 1990s and 2000s, morphing once more into a crisis of stagnation and public (as well as private) debt following the collapse of the debt pyramid in 2007-08 – but they persist. Even now economic growth is sluggish and fragile notwithstanding sustained monetary easing, levels of debt remain high, real wages remain for the great majority stagnant, inequality continues to increase, and environmental problems continue to mount.¹²⁰ In short, we are living through an ongoing multi-faceted economic, political and social crisis. Increasingly, recoveries revolve around investment in financial assets (and bubbles) rather than investment in new plant and equipment. Moreover, policymakers seem to have little idea what to do. Stuck between a rock and a hard place, they are torn between the contradictory demands of two electorates: the *Staatsvolk*, their citizenries, demanding social expenditures on health, education and welfare; and the *Marktvolk*, the financial

¹¹⁸ See W Streeck, *Buying Time* (Verso 2014).

¹¹⁹ In the 1980s the share of national income accruing to financial institutions and *rentier* owners of financial property began to rise across the globe: see Epstein, note 13, 3-6; G Dumenil & D Levy, *Costs and Benefits of Neoliberalism: A Class Analysis* in Epstein, note 13 23; G Epstein & A Jayadev, *The Rise of Rentier Incomes in OECD Countries*, in Epstein, note 13 42. Beneficial ownership of these shares – and, indeed, in all forms of financial property - is very heavily concentrated amongst the very wealthy. As Gavin Jackson says, 'only the very rich have substantial financial wealth': notwithstanding claims about creating a 'shareholder democracy' and an 'ownership society', 'Britain is not a country of widespread capital ownership': 'Who owns Britain's companies?', *FT Data*, 27 January 2016.

¹²⁰ See, for example, the OECD's latest World Economic Outlook: <http://www.oecd.org/eco/outlook/economic-outlook/>.

markets, demanding 'fiscal responsibility'.¹²¹ With this the tensions between capitalism and democracy have grown. Governments around the world are now faced by a popular backlash against a range of phenomena associated with 'globalisation' (immigration, 'liberal cosmopolitanism') and many established centrist political parties are struggling.

Partly because of the repeated crises, and partly because of the growing international competition between capitalisms, in the 1980s and 90s debate began to emerge about the best 'variety' of capitalism and best model of corporate governance. In these debates the more 'co-ordinated' capitalisms and more stakeholder-oriented corporations of continental Europe and Japan were regularly compared with the more red-blooded, market-based capitalisms and shareholder-oriented corporations of the US and the UK. Predictably, those on the right tended to try to establish the economic superiority of the latter, while those on the left sought to establish the economic (as well as social) superiority of the former - models of capitalism in which, in Polanyian terms, the economy and markets are 'embedded' in society.¹²²

Even using standard economic measures, however, it wasn't easy to establish which 'variety' was economically superior. In the 1980s the 'non-standard', more interventionist, stakeholder models of capitalism found in places like Germany and Japan seemed to be faring better, leading some business strategists to highlight the deficiencies of the American, stock-market based version of capitalism. The virtues of the German and Japanese models with their more 'patient' capital were extolled and warnings issued against moving towards 'a more American-like system'.¹²³ By the 1990s, however, the more stakeholder-friendly capitalisms were experiencing slowing growth and fiscal crises, and by the time New Labour came into office in 1997, it was the neoliberal, stock-market-oriented model of capitalism that seemed to be enjoying greater economic success. At around this time a significant number of academics, often supported by right-leaning think-tanks, sought to establish at a theoretical level the economic superiority of the Anglo-American, shareholder-oriented model of the corporation, in one case going so far as to declare the 'the end of corporate history'.¹²⁴

¹²¹ Streeck, note 118. Unable in a world of free capital movement and fiscal competition to fund from taxes the social expenditures needed and demanded by their electorates, they have become more and more dependent on borrowing.

¹²² K Polanyi, *The Great Transformation*, (1944, Beacon Press edition, 2001). In some of the literature there is a reluctance to use the word 'capitalism'. A distinction is instead drawn between 'co-ordinated market economies' and 'liberal market economies': see W Streeck, 'Bringing Capitalism Back in', (2009) Max Planck Institute for the Study of Societies, 09/8.

¹²³ See M Porter: 'Capital Choices: Changing the way America invests in Industry', in DH Chew (ed), *Studies in International Corporate Finance and Governance Systems* (OUP, 1997) 5 at 16; M Albert, *Capitalism vs Capitalism* (Four Wall Eight Windows 1993); W Hutton, *The State We're In* (Cape, 1995); R Dore, *Stock Market Capitalism: Welfare Capitalism* (OUP, 2000).

¹²⁴ H Hansmann & R Kraakman, 'The End of History for Corporate Law', (2001) 89 Georgetown Law Journal 439. In the corporate context, this was manifested in the growing influence of nexus-of-contracts theories of the corporation and the efficient capital markets hypothesis and in the belief in the virtues of the market for corporate control.

During this period the Anglo-American neoliberal model of capitalism and the corporation was vigorously promoted by international agencies.¹²⁵

In the UK, New Labour, like many traditional left-leaning parties, sought to ride the neoliberal-capitalist tiger in search of growth, developing a 'progressive neoliberalism' combining an economic programme favouring free capital movement, de-regulation and labour suppression with a liberal-meritocratic politics of identity and recognition.¹²⁶ Significantly, New Labour's Companies Act 2006, while paying lip service to stakeholding, explicitly enshrined shareholder primacy into English law for the first time, removing any lingering ambiguity about what was meant by the 'interests' or 'success' of 'the company' by openly identifying it with the benefit of shareholders.¹²⁷

Since then things have changed once more. The Great Financial Crash made it clear that much of the prosperity brought by neoliberalism was illusory - based on a mountain of unsustainable private debt, asset bubbles, and consumption detached from productive activity. Policymakers, seemingly clueless about how to get capitalism functioning smoothly again, have ploughed on, further entrenching an unbridled, financialized model of capitalism and implementing, wherever possible, further cuts to welfare and social protections ('austerity'). This has seen the 'stakeholder capitalisms' of continental Europe, already weakened by increasingly liberalised financial markets, further eroded.¹²⁸ However, for all the monetary laxity – low interest rates, quantitative easing and the like - the economic engine continues to splutter, and the victims of neoliberalism and globalisation are now expressing their frustrations at the ballot box, undermining centrist party politics in populist acts of perceived self-defence. With collective institutions crumbling, anti-collectivist ideology in the ascendency, and *capital* increasingly liberated from social constraint, *capitalism* has become ever more volatile and self-undermining, gradually eroding its own social and political conditions of existence.

IS AN ACCEPTABLE CAPITALISM POSSIBLE?

It is in this context that many have found a source of hope in another Polanyian concept, that of the 'double movement', the term Polanyi used to describe the dialectical process of marketization and the resistance to it. When markets and market

¹²⁵ See, for example, the G20/OECD's *Principles of Corporate Governance*, first published in 1999. For the latest version, see <https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf>. More generally, see S Soederberg, *The Politics of the New Financial Architecture* (Zed Books, 2004).

¹²⁶ N Fraser, 'From Progressive Neoliberalism to Trump – and Beyond' (2017) 1(4) *American Affairs*. Available at: <https://americanaffairsjournal.org/2017/11/progressive-neoliberalism-trump-beyond/>

¹²⁷ Section 172 CA2006. See Johnston, note 97, 1031. Johnston argues that directors previously had considerable discretion in determining what the interests of the company were and that this allowed for some degree of 'stakeholding': see also M Moore, 'Shareholder Primacy, Labour and the Historic Ambivalence of UK Company Law' (2016) University of Cambridge Faculty of Law Research Paper, No. 40/2016 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2835990); L Talbot, 'Trying to Save the World with Company Law', (2016) 36 *Legal Studies* 513 at 515; A Keay, 'The Duty to Promote the Success of the Company: Is it Fit for Purpose?' (2011) 32 *The Company Lawyer* 1.

¹²⁸ See W Streeck, *Re-Forming Capitalism* (OUP, 2009) and his subsequent work.

forces extend their reach and become increasingly unconstrained or 'dis-embedded', Polanyi argued, their operation becomes fundamentally destructive of human beings, nature, and society.¹²⁹ At this point, he suggested, we can expect there to emerge a counter-movement aimed at trying to reimpose effective social control over them. In recent years many have latched on to this idea, anticipating (or hoping for) a backlash against neoliberalism, an attempt to de-commodify certain resources and to 're-embed' markets, and to build an updated social democracy.

These ideas are underlain by the belief that it is possible to build social democracy on top of a capitalist economy and very often by the belief that the 'good', more humane capitalism of the post-war period was 'normal' capitalism. Thus in the 1980s, when Margaret Thatcher's government set about dismantling the post-war settlement, many saw its policies as ideologically-driven aberrations which were flowing against the tide of history. Experience showed, they believed, that the harsh logic of capitalism could not only be tempered (its rough edges smoothed by state action) but harnessed to create an ever wealthier and more compassionate society – an 'acceptable' capitalism. In Manfred Bienefeld's words, the 'Golden Age' showed that 'the logic of capital could be reconciled with the human need for security and leisure and with the social need for stability and equity'.¹³⁰ From this perspective, neoliberal policies were the product of ideological zealotry and wrong-headed theorising, and it was only a matter of time before 'normality' returned, history resumed its natural course and the victorious march of progressive, socially democratic institutions resumed. This mind-set, common amongst those (like myself) who had grown up intellectually in the post-war 'golden age', contributed to a tendency to take those institutions for granted rather than to see them as political achievements which needed constantly to be defended against pushback from capital.

Increasingly, however, the financialized forms of capitalism and corporate governance of the early twentieth century (which culminated in the 30s slump) and of the modern era (which brought us the Great Financial Crash) have come to look like corporate capitalism operating 'normally'. It is now the post-war institutional arrangements that delivered capitalism with a human face and *les trente glorieuses* that look aberrational, the exceptional products of a very particular conjuncture. From this perspective, the dismantling of social democracy looks less like a product of wayward thinking and much more, as Harvey suggests, like a response to capital's existential need to escape social restraint. In the mid-1980s, Bill Wedderburn argued that 'when an economy, like the British, is turned geriatric ... the maximisation of profit leaves little space for social experiment'.¹³¹ He might have added, 'or for social democracy' and removed the limiting reference to British capitalism.

¹²⁹ Polanyi, note 122. Polanyi focused on the 'fictitious commodities' of land, labour and money.

¹³⁰ Bienefeld, note 71, 13.

¹³¹ KW Wedderburn, 'Trust Corporation and the Worker' (1985) 23 Osgoode Hall Law Journal 203 at 249

Liberated from its post-war shackles and with labour disempowered, the pure logic of capitalism has in recent decades not merely been reasserted but extended and intensified.¹³² However, even the decline of working class power and liberation of finance has failed to lift the economy out of the doldrums, and there are currently few signs that it will.¹³³ On the contrary, as we have seen, the lack of restraint has been a source of new crises. This suggests that Alvin Hansen may have been right when he argued that capitalism's problems were structural and endemic, not merely cyclical. The claim that capitalism has an inbuilt tendency towards crisis is not, of course, new. It has long been central to Marxist analyses, which variously attribute it to the tendency of the rate of profit to fall (an alleged product of the rising organic composition of capital) and/or to inevitable problems of over-accumulation and under-consumption.¹³⁴ Since the 2007-08 crash, these theories have enjoyed something of a revival. Indeed, some mainstream economists have also begun to see capitalism's problems as structural. In a speech to the IMF in 2013, Larry Summers revived Hansen's ideas to try to account for the co-existence of low inflation, low interest rates and slow growth.¹³⁵ Lamenting the chronic shortage of demand and profitable investment opportunities, and the apparent lack of an interest rate capable of producing healthy growth, Summers suggested that 'secular stagnation' was the defining economic problem of our time. Writing in 2017, he reiterated this.¹³⁶ Certainly, the idea that capitalism, whether restrained or not, suffers from a structural tendency towards crisis would help to explain the similarities in the general direction of socio-economic travel

¹³² One question that arises is where does capitalism go now that the various spatial (outward expansion) and temporal (debt) fixes seem to have been all but exhausted.

¹³³ The prospects for growth in 2018 have improved, but the picture after that remains gloomy: See, for example, the OECD's latest World Economic Outlook: <http://www.oecd.org/eo/outlook/economic-outlook/>

¹³⁴ See, for example, M Roberts, *The Long Depression* (Haymarket, 2017), who supports theories based around the tendency of the rate of profit to fall; and D Harvey, *The Enigma of Capital* (Profile, 2011), who sees the causes of crisis as changing over time, but clearly sees the current one as arising out of a 'capital surplus absorption problem' and 'an excess or overaccumulation of capital'. Marxist analyses all tend to see the extreme 'financialization' of recent decades as a sign not of a healthy economy but an ailing one – a response to a lack of opportunities for profitable investment in the productive sector – and a source of new forms of crisis and breakdown.

¹³⁵ In fact, Hansen's ideas about secular stagnation, which were quickly forgotten when war sparked an economic recovery, were first resurrected in the 1960s by the Marxist economist (and son of a leading Wall Street banker), Paul Sweezy. Sweezy argued that a tendency towards stagnation was endemic to 'monopoly capitalism', a capitalism dominated by large oligopolistic and monopolistic corporations. 'The normal state of the monopoly capitalist economy', he argued with Paul Baran, 'is stagnation'. In his view, this tendency had been present from as early as the late nineteenth century corporate revolution but had been tempered by various countervailing forces, most notably two world wars which destroyed capital and generated new investment opportunities: Baran & Sweezy, note 34, 108; see also P Sweezy, 'Why Stagnation?' (October 2004) 56(5) Monthly Review. Sweezy was also one of the first commentators to make the link between stagnation and the financial explosion.

¹³⁶ Summers made his first speech on this in November 2013: see <http://uk.businessinsider.com/larry-summers-imf-speech-on-the-zero-lower-bound-2013-11>. He followed it up in 2015 with 'Reflections on Secular Stagnation': <http://larrysummers.com/2015/02/25/reflections-on-secular-stagnation/>. Summers and others have also suggested (like Sweezy) that the central force behind stagnation is monopoly. See, for example, P Krugman, 'Monopoly Capitalism is killing US economy', Irish Times, 19 April 2016. <https://www.irishtimes.com/business/economy/paul-krugman-monopoly-capitalism-is-killing-us-economy-1.2615956>

across national boundaries and different varieties of capitalism.¹³⁷ It also helps to explain why policymakers everywhere are finding it so hard to get it functioning ‘properly’ again.

From this perspective, the search for an ‘acceptable’ capitalism of the socially democratic type found in the post-war period is likely to prove forlorn: the problem is capitalism *tout court* rather than a particular model of capitalism. Ted Heath may, therefore, have shown uncharacteristic foresight when he omitted the ‘t’ in ‘facet’. Facet implied that the traits revealed in the Lonrho case were just one unfortunate aspect of a multi-faceted gem, and potentially a relatively minor one at that. ‘Face’, on the other hand, suggested that those traits were a significant aspect of the whole – albeit, perhaps, ones hidden behind a more attractive mask.¹³⁸

THE CORPORATE CONTEXT: MAPPING A WAY FORWARD

What, then, is to be done? What follows is an attempt to map the general direction in which we should seek to move, rather than a set of detailed, concrete policy proposals.

We need, first, to recognise that a course which tries to humanise the capitalist market economy in anything resembling its current form is very unlikely to succeed. For example, greater ‘regulation’ in the traditional sense of the word, in which certain arrangements and processes are left untouched and treated as though they are unalterable givens with a pre-regulatory existence, is unlikely to work.¹³⁹ The economic and moral logic and culture of contemporary financialized capitalism is such that corporations and corporate managers must be expected to endeavour to evade rules or just plain break them. BHS was an extreme example of a wider and increasingly entrenched phenomenon.¹⁴⁰ The financial sector, the philosopher Alasdair MacIntyre argues, is a sphere marked by ‘bad character’, the skills required to be a good ‘money trader’ being inimical to the virtues: ‘Teaching ethics to traders’, he suggests, ‘is as pointless as reading Aristotle to your dog’.¹⁴¹

In short, then, something much more radical is required. We need changes that will alter in significant ways the operating logic of our socio-economic system. An ‘acceptable’ capitalism would, therefore, be significantly less of a capitalism or, indeed, something substantially other than capitalism. The goal must be not merely to try to regulate corporations and markets but to construct arrangements which generate and

¹³⁷ W Streeck, *How will Capitalism End* (Verso 2016) chapter 10. Streeck has concluded that capitalism is dying, buried by capital itself, not the working class, arguing that its demise won’t be forestalled by the absence of a replacement: ‘... before capitalism will go to hell’

¹³⁸ See Campbell, note 3, 528.

¹³⁹ See Ireland, note 14, 85.

¹⁴⁰ The most recent example has been provided by Carillion. See Will Hutton, ‘Capitalism’s New Crisis’, *The Observer*, 21 January 2018.

¹⁴¹ J Cornwell, ‘MacIntyre on Money’, *Prospect*, October 2010. Available at: <https://www.prospectmagazine.co.uk/magazine/aldasair-macintyre-on-money>

operate according to a different logic. This would require a substantial amount of de-privatisation¹⁴², de-commodification, experimentation with alternative organisational forms and arrangements, and a democratisation of economic life. This will require radical reform on multiple fronts. The political obstacles will, of course, be considerable and maybe insurmountable, but the alternative is likely to be, as Streeck argues, a capitalism that slowly disintegrates before our eyes despite the absence of an alternative to take its place.¹⁴³

What might more radical reform entail in the corporate context? It is important to remember that although 'capitalism [has] an inner logic...', it is also a constructed system, and this means that the logic will unfold in ways that are shaped by the nature of those constructions.¹⁴⁴ We should also remember that these constructions are, in significant part, *legal* in nature. Recognition of this underlay the work of the early progressive legal realist, Robert Lee Hale, and has more recently animated the work of the so-called 'legal institutionalists'.¹⁴⁵ It also underlay the work of E P Thompson, for whom the distinctive economic and moral 'logic of process' of capitalism was derived not from human nature but from its distinctive property relations, hence the importance he attached to law in his work.¹⁴⁶ Moreover, as Thompson recognised, despite its 'inner logic', capitalism can and has existed in many different forms. While the 'number of variants is potentially 'infinite', he suggested, it 'is infinite only within the categories of social species. Just as ... there may be any number of permutations of breeds of dogs, and of mongrel cross-breeds, all dogs are doggy (they smell, bark, fawn over humans, etc.), so all capitalisms remain capitalist....'¹⁴⁷ Recent decades have seen multiple (often micro) institutional changes - many of them legal in nature and many of them impacting directly on the rights and power of labour and capital. Collectively, these changes have not only seen the economic and moral logic of capitalism reasserted, extended and intensified, they have subtly, and sometimes not so subtly, altered that logic. The result has been the emergence of a new, highly financialized (neoliberal) capitalism.

In this context, it is worth remembering that a tendency towards a greater concentration and centralization of capital – and towards financialization - is inherent in the logic of capitalism. Competition encourages technological advances which often demand larger-scale production and larger firms; it also encourages firms to merge with other firms even in the absence of significant scale economies, either to eliminate rivals or to provide investment outlets for surplus capital.¹⁴⁸ Both factors contributed to

¹⁴² See Hutton, note 140.

¹⁴³ See Streeck, note 137.

¹⁴⁴ Bienefeld, note 71.

¹⁴⁵ On Hale, see Ireland, note 14. On 'legal institutionalism', see S Deakin, D Gindis, G Hodgson, K Huang & K Pistor, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law', (2017) 45(1) *Journal of Comparative Economics* 188-200.

¹⁴⁶ From this perspective, the need for unending economic growth is derived not from human nature but from capital's existential need to keep expanding. On Thompson's idea of 'logic of process', see Ireland, note 20.

¹⁴⁷ E P Thompson, 'The Long Revolution', note 20, 34 at 38

¹⁴⁸ See L Hannah, *The Rise of the Corporate Economy* (Methuen 1976).

the rise of the joint stock corporation and rapid expansion of the credit system in the later nineteenth and early-twentieth centuries. Crucially, the interest of the great majority of the shareholders in these corporations was (and is) purely financial. They are interested not in production or the firms in which they have invested, but in financial returns and capital values.¹⁴⁹ As commentators like Marx and Veblen pointed out in the late nineteenth and early twentieth centuries, a tendency towards financialization was, therefore, inherent in these developments. Predictably, then, this period saw the rise of new forms of property and property relations, more financialized firms and a more financialized capitalism, albeit one in which industrial capital still remained broadly dominant.¹⁵⁰

It should not be forgotten, however, that the very same commentators also saw in these developments the possibility of a future characterised by more ‘socialised’ corporations and a more ‘socialised’ capitalism (and, in some cases, something other than capitalism). This was because of the nature of shareholding and property in these corporations. Corporate shareholders owned revenue rights (shares), not rights to tangible assets (these were now owned by the corporation as a separate legal person), and they had handed operational power over to professional managers. They looked and acted more like creditors than owners, and when shares became fully paid-up, they were rendered functionless. As we have seen, in the middle decades of the twentieth century, as they became more dispersed, their ability to control managers was also diminished, raising further questions about the legitimacy of their residual proprietary rights. Were they not better seen as ‘owed’ rather than ‘owning’? And shouldn’t their corporate rights be adjusted accordingly?¹⁵¹

In the ‘golden’ post-war years, with managers subject to range of pressures from organised labour, the state, and ‘public opinion’, it was a ‘socialized’ vision of the future of capitalism that seemed to be in the process of realisation. However, socialization was not, as some advocated, translated into significant changes to corporate property rights structures. Indeed, the fact that change had been achieved without this (mis)led many to believe that socialization was possible without attenuating shareholder proprietary rights and re-allocating them, in whole or in part, to employees and other stakeholders. All that was needed to cement ‘stakeholder corporations’, it seemed, were a few tweaks to directors’ duties and the development of professional managers with the right values and culture. This mind-set was summed up by one of the section titles in Crosland’s *The Future of Socialism*: ‘The Growing Irrelevance of the Ownership of the Means of Production’.¹⁵² It also contributed (along with resistance from many within the labour movement) to the petering out, in the 1970s, of proposals

¹⁴⁹ See Ireland, note 66.

¹⁵⁰ See Sweezy, note 113.

¹⁵¹ See P Ireland, ‘Efficiency or Power? The Rise of the Shareholder-oriented Joint-stock Corporation’ forthcoming in 24 *Indiana Journal of Global Legal Studies* (2018).

¹⁵² Crosland, *Future of Socialism*, note 76, 35.

to introduce industrial democracy and worker board-level participation in management.¹⁵³

With hindsight, we can see that the failure to effect changes to corporate rights structures was a historic mistake. The survival, undiluted and intact, of the residual proprietary rights of the *rentier* shareholder has been one of the key legal foundations for the growing financialization of corporate governance and radical reassertion and intensification of the logic of capitalism. Some commentators have implicitly recognised this. Thus, Colin Mayer has called for the traditional emphasis on ‘incentives, ownership and control’ to be supplemented with an emphasis on ‘obligations, responsibilities and commitment’, proposing *inter alia* that voting rights be withheld from shareholders until they have demonstrated their ‘ownership’ credentials by holding their shares for a minimum period.¹⁵⁴ It would be churlish not to support measures like this, aimed at getting shareholders to act more like ‘proper’, active, committed owners, and managers to act more like ‘stewards’. We need to recognise, however, that the great majority of corporate shareholding is passive and financially motivated, and that the increasing mediation of share ownership by institutions acting as the ‘general managers’ of ‘all lenders of money’ and operating in global capital markets has intensified this financial focus. Trying to get no-liability, no-responsibility, *rentier* shareholders and their representatives to act more like proper owners is rather like trying to get cats to bark.

Indeed, reforms which propose to solve our corporate governance problems by further empowering shareholders and encouraging them to be more active and to act more like proper owners are likely to exacerbate those problems, not solve them.¹⁵⁵ Although proposals such as Mayer’s for time-dependent voting rights are, then, steps in the right direction, they don’t go far enough. The power of *rentier* investors – of finance - needs to be diminished and provision made for much greater ‘stakeholder’ involvement in corporate governance. What is needed is, as John Parkinson said, writing of the ‘pluralist’ approach to governance rejected by the Company Law Review, is ‘thorough-going reform aimed at altering companies’ decision-making structures and the location of ultimate control’.¹⁵⁶ In short, we need to resurrect the potential radicalism of the mid-twentieth century, and to make, in Gower’s words, ‘substantial modifications [to] the legal framework of companies’ which recognise that enterprises of this sort ‘should be run for and on behalf of the public as a whole and not merely for the benefit of the shareholders’.¹⁵⁷ We need at the same time to foster

¹⁵³ B Clift et al, ‘The Labour Party and the Company’, in J Parkinson et al (eds), *The Political Economy of the Company* (Hart, 2000), 51. In the UK, all that emerged was an ineffectual duty for directors to consider the interests of employees: see text accompanying note above.

¹⁵⁴ C Mayer, *Firm Commitment* (OUP, 2013) 6, 246-8. This underpins his proposed solution: ‘trust companies’.

¹⁵⁵ See J-P Robe, ‘The Shareholders Rights Directive II: The Wrong Cure for a Deadly Disease’, (2016) 17(1) ERA Forum 45. See also L Talbot, ‘Why Shareholders Shouldn’t Vote’, (2013) 76 Modern Law Review 791.

¹⁵⁶ J Parkinson, ‘Inclusive Company Law’, in J de Lacy, *Reform of UK Company Law* (Routledge-Cavendish, 2002) 43 at 50.

¹⁵⁷ Gower, *Principles* (2nd ed, 1957), note 53, 231.

experimentation with alternative organisational forms: social enterprises, workers co-operatives, B Corps, community interest companies, mission-led businesses and the like.¹⁵⁸ Put simply, *ownership does matter*, though we need to recognise that the range of institutional possibility is much greater than that between full liberal ownership by private individuals and full liberal ownership by the state.¹⁵⁹ The rights in the ownership bundle can be divided and allocated in many different ways, and rights structures can vary between resources and contexts.¹⁶⁰

Changing corporate proprietary structures will not, however, in and of itself change very much if enterprise managers (whoever they are and whatever their duties) remain subject to the intense financial market pressures which currently prevail. Financial power needs to be curbed and the financial system brought under much greater collective control. In *The General Theory*, Keynes wrote that speculators ‘may do no harm as bubbles on a sea of enterprise’ but ‘the position becomes serious when enterprise becomes the bubble on a sea of speculation. When the capital development of a country becomes a by-product of the activities of a casino, the job is likely to be ill-done’.¹⁶¹ In Keynes’ view, ‘the investment policy’ which was most ‘socially advantageous’ was not necessarily that which was most profitable. This led him to conclude that the state, which was better placed to take a longer view and to take account of the general social interest, should take greater responsibility for ‘directly organising investment’. He therefore advocated a ‘somewhat comprehensive socialisation of investment’ to channel resources away from speculation towards productive activity.¹⁶² An opportunity to move in this direction was lost in the crash of 2007-08, when the losses of the banks were socialised but not the banks themselves. If, or, as seems more likely, when, we are confronted with further recessions/crashes¹⁶³, we should not spurn similar opportunities. Keynes hoped that these ‘necessary measures of socialization’ would, by ‘leashing capitalism’¹⁶⁴, save it. But events have not proceeded as Keynes hoped and envisaged. We have not seen the ‘euthanasia of the *rentier*’ and with it ‘the euthanasia of the cumulative oppressive power of the capitalist to exploit the scarcity value of capital’. Nor have we seen his hoped-for harnessing of ‘the intelligence and determination of the executive skill of the financier [and] entrepreneur . . . to the service of the community on reasonable terms’.

¹⁵⁸ See Boeger & Villiers (eds), note 117.

¹⁵⁹ R Unger, *The Left Alternative* (Verso, 2005). See also P Ireland & G Meng, ‘Post-Capitalist Property’, (2017) 46(4) *Economy & Society* 369.

¹⁶⁰ AM Honore, ‘Ownership’, in A G Guest, *Oxford Essays in Jurisprudence* (1961), 107; See also Ireland & Meng, *ibid*.

¹⁶¹ JM Keynes, *The General Theory of Employment, Interest and Money* (1936), chap 12. Reprinted in E Johnson and D Moggridge (eds), *The Collected Writings of John Maynard Keynes* (London: Macmillan) vol. 7.

¹⁶² Keynes, *ibid*, chapters 12 and 24. See also H Davis, “Keynes on the socialization of investment” (1992) 19 *International Journal of Social Economics* 150.

¹⁶³ See C Aksan & J Bailes, ‘Are we Heading for Another Economic Crash?’, *Verso Blog*, 17 January 2018. Available at: <https://www.versobooks.com/blogs/3568-are-we-heading-for-another-economic-crash>

¹⁶⁴ R Pollin, “The resurrection of the rentier” (2007) 46 (July–August) *New Left Review* 140 at 142, reviewing A Glyn, *Capitalism Unleashed* (Oxford UP 2006).

On the contrary, Heath's facet has become the norm. It is time, perhaps, to recognise that an 'acceptable' capitalism may be a chimera.